OPINION 1

Eugene HASENFUS and Sally Hasenfus, Plaintiffs-Appellants,

v.

Richard SECORD, an individual, Corporate Air Services, A Pennsylvania corporation; Southern Air Transport, a Florida corporation; albert Hakim, an individual, Defendant-Appellees.

Kasanee SAWYER, an individual, Kasanee Sawyer,Administratrix of Sawyer, Wallace B., Deceased, Plaintiffs-Appellants,

v.

Richard SECORD, an individual, Corporate Air Services,Southern Air Transport, a Florida corporation, Albert Hakim, an individual, et al., Defendants-Appellees.

Nos. 91-5106, 91-5107.

United States Court of Appeals,
Eleventh Circuit.
June 15, 1992.

Before HATCHETT, Circuit Judge, JOHNSON and HENDERSON, Senior Circuit Judges.

HATCHETT, Circuit Judge:

We affirm the district court's ruling that Richard Secord, Albert Hakim, Southern Air Transport (SAT) and Corporate Air Services (CAS) are not liable to Eugene and Sally Hasenfus and Kasanee Sawyer for damages resulting from covert air missions to resupply the Nicaraguan "Contras."

FACTS

In 1985, the United States Congress discontinued funding for the "Contras," a military force seeking to overthrow the Nicaraguan government. Soon thereafter, Oliver North, a United States Marine Corps lieutenant colonel and National Security Council aide, undertook to arrange covert funding for the Contra rebels. North solicited Richard Secord, a retired Air Force general, to organize an airlift operation into Swiss bank accounts over which he maintained discretion and control.

Secord engaged Richard Gadd to organize the airlift. Gadd worked with Southern Air Transport (SAT) and Corporate Air Services (CAS) in arranging various services required for the operation, such as maintaining aircraft and hiring personnel.

In early 1986, CAS hired Wallace B. Sawyer, Jr., an Air Force Academy graduate and an experienced combat pilot. William Cooper, also an experienced combat pilot, served as the "on-site manager" for the operation at Ilopango Air Base in El Salvado and as a pilot. Eugene Hasenfus, a former Marine paratrooper, joined the operation as an "air freight specialist."

Secord and his agents directed the air drops to Contras concentrated in the northern and southern parts of Nicaragua. The northern air drops were relatively easy,

involved short distances, and could be undertaken at night. The southern air drops were far more difficult, required seven-hour round trips, and, for various reasons discussed later, were flown during the day.

During 1986, several successful air drops were completed. Around midday on October 5, 1986, however, Nicaraguan forces shot down a southern resupply flight with a heat-seeking missile. The missile strike killed Cooper, Sawyer, and a Contra aboard the flight. Hasenfus parachuted from he plane and survived, but Nicaraguan forces captured him the following day. Within three months, the Nicaraguan government tried, convicted, and pardoned Hasenfus. By Christmas, he was back home in the United States.

PROCEDURAL HISTORY

Eugene and Sally Hasenfus and Kasanee Sawyer (appellants) sued Secord, his partner, Albert Hakim, SAT, and CAS (appellees).[1] The Hasenfuses' third amended complaint alleged: (I) breach of Eugene Hasenfus's written employment contract with CAS; (II) breach of an oral contract to pay Hasenfus's legal expenses arising from the trial in Nicaragua; (III and IV) intentional and negligent misrepresentation relating to the promise to pay Hasenfus's Nicaraguan legal expenses; and (V) conversion of Hasenfus's papers and personal effects in an attempt to cover-up the resupply operation. Sawyer's complaint alleged: (I) breach of an oral contract with CAS to pay salary, expenses, and a death benefit; (II) negligent failure to provide safe aircraft and required safety equipment; (III

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[1] The Hasenfus and Sawyer cases were consolidated for trial. CAS and Hakim were dismissed for insufficient service of process.

and IV) intentional and negligent misrepresentation contained in promises to provide safe aircraft and proper safety equipment; and (V) wrongful death as a result of the alleged negligence.

The district court dismissed the appellants' claims that the appellees were strictly liable for Hasenfus's injuries and Sawyer's death. At the close of all the evidence, the district court entered directed verdicts for appellees on the Hasenfuses' conversation claim and on Sawyer's negligence, misrepresentation, and wrongful death claims. Thus, the following claims went to the jury for special verdicts: (1) the Hasenfuses' written contract claim; (2) the Hasenfuses oral contract claim relating to the promises to pay for Eugene's Nicaraguan trial expenses; and (3) Sawyer's claim that appellees breached an oral agreement to pay salary, expenses, and a death benefit. The jury found that SAT and Secord engaged in a joint venture, and that CAS and other persons acted as Secord's and SAT's agents. Nonetheless, the jury found for Secord and SAT on all liability issues.

ISSUES

The issues presented are: (1) whether the trial court erred in entering directed verdicts for appellees on Sawyer's negligence and misrepresentation claims; (2) whether the trial court erred in its instructions to the jury on Hasenfus's contract and misrepresentation claims; (3) whether the trial court erred in the special verdict form submitted to the jury on Sawyer's contract claim; and (4) whether the trial court erred in denying appellees' motion for a directed verdict on joint venture and agency.

DISCUSSION

A. The Directed Verdicts

This court reviews *de novo* the district court's entry of a directed verdict. The district court should grant a motion for directed verdict if "the facts and inferences point overwhelmingly in favor of one party such that reasonable people could not arrive at a contrary verdict." *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). The court must consider "all the evidence and the inferences drawn therefore in the light most favorable to the nonmoving party." *Carter*, 870 F.2d at 581. We may not affirm the district court's entry of a directed verdict if the record contains "substantial evidence" opposing the motion. *Carter*, 870 F.2d at 581. "A mere scintilla of evidence," however, is not sufficient to defeat the motion. *Carter*, 870 F.2d at 581; *see also Boing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

1. *The Negligence Claim*

Sawyer contends that she introduced sufficient evidence to defeat the motion for directed verdict on her negligence claim. Witnesses testified that the southern resupply missions could have been flown at night if the planes contained the proper navigation equipment, and that such night flights would have been "safer" than flying during the day. Sawyer also argues that appellees negligently failed to provide the crew with adequate safety equipment, such as parachutes and survival kits. Appellees respond that they were not negligent in equipping the plane or the crew. Alternatively, any negligence did not proximately cause Sawyer's death. Finally, appellees argue that they are not liable because Sawyer assumed the risk of

death when he agreed to fly supply missions over hostile territory.

While the facts of this case are unusual, the legal principles we must apply are well established. To prevail in a negligence action, the plaintiff must show: (1) that the defendant owed a duty of reasonable care to the plaintiff; (2) that the defendant breached that duty; (3) that the breach was the proximate cause of the injury to the plaintiff; and (4) that the plaintiff suffered damages. *See e.g., Rupp v. Bryant*, 417 So.2d 658, 668 n.27 & accompanying text (Fla. 1982); *Reinhart v. Seaboard Coast Line R.R. Co.*, 422 So.2d 41, 43 (Fla.App. 1982), *petition den.*, 431, So.2d 989 (1983). Failure to establish any one of these elements is fatal to the plaintiff's case. *See, e.g., Gooding v. University Hospital Bldg., Inc.*, 445 So.2d 1014, 1018 (Fla.1984) (defendant entitled to directed verdict because plaintiff failed to establish proximate cause, even though plaintiff established other elements of negligence case). Under Florida law, the plaintiff must introduce sufficient evidence from which a reasonable jury could conclude that the defendant's negligence was the probable cause of the plaintiff's injury. *See Hessen v. Jaguar Cars*, 9015 F.2d 641, 647 (11th Cir. 1990). The trial court may decide on a motion for directed verdict whether the plaintiff has introduced sufficient evidence to carry this burden before the jury:

> [The plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of

> pure speculation or conjecture or the probabilities are at best evenly balanced it becomes the duty of the court to direct a verdict for the defendant.

Gooding, 445 So.2d at 1018 (quoting Prosser, Law of Torts § 41 (4th ed. 1971)). In this case, no reasonable person could conclude from the evidence presented that appellees' alleged negligence proximately caused Sawyer's death.

All of the witnesses testified that conditions in southern Nicaragua required that the air drops be made with pinpoint accuracy. Because of the dense jungle, supplies could be lost if the crew missed the drop zone by even the shortest distance. According to the testimony at trail, the only way to achieve the required accuracy was to fly over the drop zone at altitudes of 400 to 800 feet. Flying at such low altitudes exposed the planes to missile, anti-aircraft, and small arms fire.

The majority of the testimony at trial held that safety and accuracy considerations militated in favor of daytime resupply flights in southern Nicaragua. But Sawyer's witness, Elmo Baker, testified that he would have flown the missions at night if appellees had equipped his plane with an inertial navigation system (INS). Baker and another witness, James Wilburn, testified that night flights would have been "safer." At another point in his testimony, however, Baker stated that the risk of anti-aircraft and missile fire at low altitudes was the same whether the missions were flown during the day or at night.[2] Thus,

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[2] A. Yes.
Q. And at five to eight hundred feet if there were Sandinista troops in the area it would-
(continued...)

appellants' witness established that the absence of an INS and the need to fly during the day did not proximately cause Sawyer's death. Rather, the most proximate cause of Sawyer's death was the need to fly low in order to hit the drop zones, thereby exposing the aircraft to missile fire. According to appellants' witness, the risk of such fir at low altitudes was the same, day or night. Thus, the absence of night navigation equipment had no impact on the relevant risk.

Only one witness, Wilburn, testified specifically that the plane was an easier target for surface-to-air missiles during the day.[3] At an0ther point in his testimony, however, Wilburn stated that the risk of a successful missile attack was the same, day or night.[4] Two other expert witnesses testified at length that day flying offered an equal

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[2](...continued)

n't make much difference if it was nighttime or daytime, would it?

A. Not at that altitude.

[3] Wilburn testified:

> You can still see further in the daytime than you can see at night and this poor soul that's carrying this missile around on his shoulder can see you a lot further in the daytime than he can see you at night. And with that in mind, I would much prefer personally to fly at night.

[4] The following exchange occurred during Wilburn's cross-examination:

Q. Mr. Wilburn, would the risk of a successful attack by a surface-to-air missile be different whether you're going in the daytime or the nighttime?

A. The attack by the missile itself, no sir.

or better chance of survival against surface-to-air missiles than night flying.

Viewing this evidence in its entirety, we agree with the district court that appellants did not introduce substantial evidence that the absence of an inertial navigation system proximately caused Sawyer's death. The testimony of Baker and Wilburn raises the possibility that equipping the plane with an INS would have prevented it from being shot down. But Baker and Wilburn's other statements, and the consistent testimony of the other witnesses, showed that equipping the plane with an INS probably would not have reduced the risk posed by surface-to-air missiles. Because appellants' case raised no more than a possibility that appellees' negligence was the proximate cause of their injury, the district court was obligated to direct a verdict for appellees. *Gooding*, 445 So.2d at 1018.

Sawyer's negligence claim based on the purported lack of safety equipment similarly fails for absence of causation. Sawyer introduced no evidence that Wallace Sawyer would have survived the missile attack if he had been furnished a parachute and a survival kit. Indeed, the only relevant evidence in the record, Eugene Hasenfus's compelling eyewitness testimony, indicated that the other crew members had little chance to escape from the plane after the missile hit. Appellants' evidence did not raise the possibility, much less the probability, that Sawyer would have survived the crash if provided proper safety equipment. Similarly, appellants introduced no evidence that

Hasenfus would have been rescued if provided with a radio.[5]

2. *Sawyer's Misrepresentation Claim*

Sawyer contends that the district court erred in directing a verdict for appellees on her intentional and negligent misrepresentation claims. Sawyer argues that appellees induced her husband to continue flying Contra resupply missions with promises of airplane repairs and better safety equipment. According to Sawyer, her husband would not have continued to participate in the operation but for appellees' promises.

To prevail on her claim of intentional misrepresentation,Sawyer must show:

> (1) a false statement of fact; (2) known by the defendant to be false at the time it was made and (3) made for the purpose of inducing the plaintiff to actin reliance thereon; (4) action by the plaintiff in reliance on the correctness of the representations; and (5) resulting damage to the plaintiff.

Stowell v. Ted S. Finkel Investment Services, Inc., 641 F.2d 323 (5th Cir. Unit B 1981) (applying Florida law); *see also Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1103 (11th Cir. 1983). To prevail upon her claim of negligent misrepresentation, Sawyer must establish the same five elements with one modification. With respect to the

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[5] We do not consider Hasenfus's belated claim that Cooper negligently followed a flight path that increased the danger of missile attack. The claim first appeared in appellants' motion for a new trial. The district court either ignored the claim, with it was entitled to do under the circumstances, or grouped it with appellants' other negligence claims in ruling that appellants failed to demonstrate proximate cause.

second element, Sawyer need only show that appellees negligently failed to ascertain the truth or falsity of the representation. *See Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1087-88 (5th Cir. 1970) (applying Florida law).

Like her negligence claim, Sawyer's misrepresentation claims fail for lack of proximate cause. To prevail on her misrepresentation claim, Sawyer must show that her husband's reliance on appellees' misrepresentations caused his death. *See Stowell*, 641, F.2d at 325. Viewing the evidence in the light most favorable to Sawyer, however, she proved only that appellees' misrepresentations induced her husband to continue working for C.A.S. The pilots made the decision to fly each mission. Sawyer does not claim that in making the decision to fly on October 5, 1986, her husband relied upon any representations about the condition of the plane. To the contrary, the evidence showed that Sawyer, an experienced combat pilot, knew the condition of the plane he flew. To the extent that the plane lacked important navigational equipment, Sawyer was fully aware of that fact. Thus, in undertaking the action that led to his death--embarking on the ill-fated mission--Wallace Sawyer did not rely upon any misrepresentation by appellees. Instead, he relied on facts fully within his knowledge. Because Sawyer cannot demonstrate a causal link between appellees' representations about improved equipment and Sawyer's decision to fly on October 5, 1986, Sawyer cannot prevail on her misrepresentation claim.

B. The Jury Instructions and Special Verdict Forms

Appellants contend that errors in the jury instructions and special verdict forms require a new trial. The Hasenfuses argue that the district court failed to instruct the

jury on Eugene's oral contract claim and erroneously instructed the jury that the contract terminated on October 5, 1986. The Hasenfuses also argue that the district court failed to instruct the jury on their theory that Elliott Abrams and William Schofield, two State Department officials, acted as appellees' agents. Sawyer argues that the district court committed error in the special verdict form when it failed to ask specifically whether a contract existed between Sawyer and appellees' agents.

This court reviews the district court's denial of a motion for a new trial for abuse of discretion. *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 643 (11th Cir. 1990). In reviewing jury instructions, we must "view the challenged instructions as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues." *Johns v. Jarrard*, 927 F.2d 551, 554 (11th Cir. 1991) (quoting *National Distillers and Chemical Corp. v. Brad's Machine Products, Inc.*, 666 F.2d 492, 497 (11th Cir. 1982) (internal quotations omitted)). Special verdict forms must enable the jury to resolve essential facts logically and consistently. *See Burger King Corp. v. Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102, 104 S.Ct. 1599, 80 L.Ed.2d 130 (1984).

The district court committed no reversible error in the jury instructions or special verdict forms. Contrary to the Hasenfuses' contentions, the district court carefully instructed the jury that it could find an oral agreement existed between Hasenfus and appellees. Moreover, the district court properly instructed the jury that the contract terminated the day the plane was shot down. While

Hasenfus testified that he expected the benefits of his employment to extend beyond that date, he introduced no evidence that appellees made such promises.

Similarly, the district court did not err in refusing to instruct the jury that Schofield and Abrams were appellees' agents as a matter of law. The record evidence was insufficient to support such an instruction. In any event, the district court did not preclude the jury from finding that Schofield and Abrams were appellees' agents. The court's instruction asked whether "William Cooper or anyone acting for Corporate Air Services, Ltd. was an agent of the defendants." The court allowed the Hasenfuses to present all their evidence on the Schofield/Abrams agency issue, and it allowed them to argue it fully before the jury. Thus, the arguments and evidence, coupled with the instruction given, fairly presented this issue to the jury.

Finally, the district court did not err in the special verdict form on Sawyer's contract claim. The form first asked the jury to determine whether Cooper or CAS were agents of appellees at the time Sawyer signed the written contract. The form next asked the jury to determine whether a contract existed between Sawyer, on the one hand, and Secord or SAT, on the other hand. From the court's instructions on agency, and the jury's finding that Cooper and CAS were appellees' agents, the jury could conclude that the question about Sawyer's contract incorporated the possibility of an agreement between Sawyer and appellees' agents. In the context of the trial, the court's instructions did not fail to inform the jury that it could find an oral contract between Sawyer and appellees' agents.

C. Joint Venture and Agency

Appellees' challenge to the district court's denial of their motion for a directed verdict on joint venture and agency is also without merit. The record contained sufficient evidence from which a reasonable jury could find joint venture and agency.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

JOHNSON, Senior Circuit Judge, concurring specially:

Although I agree with all of the results reached by the majority and most of the reasoning underlying those results, I write separately to note my disagreement with the majority's causation analysis regarding Sawyer's misrepresentation claims. *See supra*, opinion at 1561-1562. The majority states that, although it found evidence that Sawyer's husband would not have continued to work for the defendants but for the alleged misrepresentation, Sawyer had not established the requisite causal link between the alleged misrepresentation and her husband's death. According to the majority, Sawyer must prove that the alleged misrepresentation induced her husband's decision to board the precise flight that resulted in his death. In other words, even if Sawyer had demonstrated that her husband would not even have worked for the defendants at the time of his death absent the alleged misrepresentation, she would not have established a sufficient causal nexus. The majority cites no authority supporting the extremely onerous burden

of proof that it imposes on Sawyer, and I can see no justification for it.

Nonetheless, I concur in the result because the ground asserted by the district court is sufficient to justify our affirmance of the directed verdict. The district court found no evidence whatsoever that the alleged misrepresentation was even uttered to Sawyer's husband, and Sawyer fails to cite this Court to any such evidence. Without evidence of this essential element, the directed verdict was proper.

OPINION 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

EUGENE HASENFUS, an individual, and SALLY HASENFUS, an individual,
Plaintiffs,
vs.
RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation,
Defendants.
_____/

Case No. 88-1841-CIV-ATKINS

KASANEE SAWYER, an individual; and KASANEE SAWYER, Administratrix of WALLACE B. SAWYER, Deceased,
Plaintiffs,
vs.

Case No. 88-1850-CIV-ATKINS

RICHARD SECORD, an individual, and SOUTHERN AIR TRANSPORT, INC., a Florida Corporation,
Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR DIRECTED VERDICT

THIS CAUSE is before the Court on Defendants' Motion for Directed Verdict.[1] After careful consideration of the motion, the response, the relevant law and upon hearing arguments on this motion, it is

ORDERED AND ADJUDGED that the defendants' Motion for Directed Verdict is GRANTED IN PART and DENIED IN PART as follows:

(1) The motion is denied as to the joint venture and agency theories of liability;

(2) The motion is denied as to Eugene Hasenfus' claim for breach of written contract;

(3) The motion is denied as to Sally Hasenfus' claims for breach of oral contract, intentional misrepresentation and negligent misrepresentation;

(4) The motion is granted as to Eugene Hasenfus' claim for conversion;

(5) The motion is denied as to the Sawyers' claim for breach of contract; and

(6) The motion is granted as to the Sawyers' claim for negligence, intentional misrepresentation, negligent

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[1] Defendant Richard Secord filed the motion for directed verdict and defendant Southern Air Transport, Inc. joined the motion by stating such on the record in open court. This Order supplements the Court's Order granting in part and denying in part defendants' motion for directed verdict which was announced to all the parties in open court on August 17, 1990, at the close of all the evidence.

misrepresentation and the wrongful death claim which was based on the above causes of action.

I.

FACTS AND BACKGROUND INFORMATION

The facts and general background of the present case are set forth in prior court orders, and the familiarity with those facts is presumed. See Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion to Dismiss (March 29, 1989) ("Order on Motion to Dismiss"), at 2-4; Order Denying Defendant Richard Secord's Motion to Dismiss Plaintiffs' Amended Complaint (May 3, 1990) ("Order on Motion to Dismiss"), at 1-3; Order Granting in Part and Denying in Part Defendant Southern Air Transport's Motion for Summary Judgment (July 24, 1990) ("Order on Motions for Summary Judgment"), at 1-4.

A brief representation of the facts follows. This case arises out of the covert attempt to supply arms to the so-called Contra forces in Nicaragua. In 1985, a resupply operation was organized which was to include a series of privately funded airlifts designed to support the Contra forces. Amalgamated Commercial Enterprises ("ACE")[2] was acquired and an ACE bank account set up to facilitate the transfer of funds necessary to run the operation. Two aircraft were purchased, and Corporate Air Services ("CAS"), Ltd. was established as a corporation under the laws of El Salvador. William Cooper, who was evidently employed by CAS, Ltd., recruited various people including

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[2] "ACE" was described as a "shelf corporation" purchased in Panama where the ACE bank account was established. One of Southern Air Transport's Officers went to Panama for this purpose.

Eugene Hasenfus and Wallace B. Sawyer to participate in the covert operation. Southern Air Transport ("SAT") also participated in the resupply missions.

The agreement allegedly reached between Hasenfus and Cooper and/or CAS, Ltd. is evidence by an "Independent Contractor Agreement" which was signed by Cooper on behalf of CAS, Ltd. and admitted into evidence during the trial. Likewise, a similar document was submitted into evidence on behalf of Sawyer; however, only Sawyer's signature appeared on that document.

Several successful missions occurred before the resupply operation terminated sometime in 1986. On October 5, 1986, one of the resupply planes piloted by Wallace B. Sawyer and William Cooper was shot down over Nicaragua. Sawyer and Cooper died in the crash. The only survivor of the crash was Eugene Hasenfus, whose job was to push the necessary packages out of the aircraft when it flew over the designated zones. It was later determined that the plane was struck by an unseen heat-seeking missile. Hasenfus was captured, imprisoned, and three months later, pardoned and set free by the Nicaraguan government.

II.

DISCUSSION

A. General Principles for Directed Verdict Motions.

The standard for a directed verdict under Rule 50(a) mirrors the standard for summary judgment under Rule 56(c). See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Thus, a directed verdict or summary judgment must be entered against any party if the evidence

is such that a reasonable jury could not return a verdict for the nonmoving party. Id. at 248. At this state, it is not the court's function to weigh the evidence but to determine whether there is a genuine issue for trial. Id. at 249. It is within the power of the trial court to direct a verdict at any point in the trial where it is apparent that there is a complete absence of any question to send to the jury. Best v. District of Columbia, 291 U.S. 411, 415 (1933).

The standards applicable to motions for directed verdicts were first set forth in this circuit in the case of Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc),[3] where the Fifth Circuit stated that:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

Id. at 374. In making these determinations the evidence must be viewed in the light most favorable to the

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[3] The law of the Fifth Circuit through October 1, 1981 is the law of the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

nonmoving party. Id. at 375. Recent cases in the Eleventh Circuit have continued to follow the standards set forth in Boeing and the dictates of the Supreme Court cases in this area. See Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989); Dancey Company, Inc. v. Borg-Warner Corporation, 799 F.2d 717 (11th Cir. 1986).

As to the timing of the motion, it is entirely proper for the court to grant a motion for directed verdict at the close of all the evidence. See United v. Vahlco Corporation, 720 F.2d 885, 889 (5th Cir. 1983) (district courts should not jump the gun but should wait until both sides have presented their evidence before ruling on motions for directed verdict); C. Wright and A. Miller, Federal Practice and Procedure: Civil section 2533 (1971) (better practice to defer ruling on motion for directed verdict until both sides have rested).

B. Application to the Present Facts.

In the present case, the Court must engage in a two-part directed verdict inquiry. The Court must first determine whether there exists sufficient evidence form which a jury could reasonably impose vicarious liability on the defendants. Assuming plaintiffs satisfy this threshold requirement, the Court must then apply the directed verdict standards to the substance of each count.

1. Vicarious Liability.

Vicarious liability in this case can be demonstrated through two theories: joint venture and agency. A "joint venture" has been defined as a "special combination of two or more persons, who in some specific venture, seek a profit jointly without the existence between them of any actual partnership, corporation, or business entity." Florida

Tomato Packers, Inc. v. Wilson, 296 So. 2d 536, 539 (Fla. Dist. Ct. App. 1974). Joint ventures can also be comprised of corporations. Id. To support a finding of a joint venture, the relationship between the parties must consist of the following elements:

> (1) a common purpose; (2) a joint proprietary interest in the subject matter; (3) the right to share profits and the duty to share losses; and (4) the right of joint control.

Pinnacle Port Community Association, Inc. v. Orenstein, 872 F.2d 1536, 1539 (11th Cir. 1989) (setting forth requirements under Florida law). If each of these elements is present, then: (1) the parties are said to be joint venturers; and (2) a third party plaintiff may impose liability against one venturer for the actions undertaken in furtherance of the enterprise by a co-venturer. See Conner v. Southland Corp., 240 So. 2d 822, 825 (Fla. Dist. Ct. App. 1970).

Applying these principles to the facts of the present case, the Court concludes that the plaintiffs have adduced sufficient evidence from which a jury could conclude that the plaintiffs sustained injuries from parties acting pursuant to a joint venture. For a detail of the facts in support of this conclusion see pages 12 through 15 of this Court's Order on Motions for Summary Judgment dated July 24, 1990. In considering the evidence in the light most favorable to the plaintiffs, the motion for directed verdict must be denied as to the joint venture theory.

The other vicarious liability theory is the agency theory. Florida law provides that:

> a principal is liable if his actions or words operate to hold out the agent a possessing authority to act on behalf of the principal, thereby vesting apparent authority in the agent.

Smith v. United States, 599 F. Supp. 606, 608 (S.D. Fla. 1984) (construing Florida law). This general rule is, however, qualified by the specific requirement that a principal can be held liable for the acts of its agent only if those acts are undertaken within the scope of the agency. See Acme Oil v. Vasatka, 465 So.2d 1314, 1317 (Fla. Dist. Ct. App. 1985).

Applying these principles to the facts of the present case, the Court concludes that the plaintiffs have adduced sufficient evidence from which a jury could conclude William Cooper and/or CAS, Ltd. acted as agents of the defendants. Specifically, there was evidence tending to show that William Cooper operated out of SAT's Miami offices and wore a badge which identified him as being associated with SAT. See Hasenfus Affidavit, paras. 3-4 and his testimony during the trial. There is also evidence from which a jury could infer that SAT had some degree of control over the employee hiring decisions made by CAS, Ltd. See Stevenson Affidavit, para. 12 (SAT would forward to Stevenson, a CAS, Ltd. mechanic, the names of people SAT wished to see hired). Therefore, the motion for direct verdict as to the agency theory is denied.

2. The Substantive Counts.

In this case, the Hasenfuses, through their Third Amended Complaint, seek damages from all the defendants based on the following theories: (1) breach of written contract; (2) breach of oral contract; (3) breach of inten-

tional and/or negligent misrepresentation; and (4) conversion. Likewise, the Sawyers' Third Amended Complaint charges the defendants with: (1) breach of contract; (2) negligence; (3) intentional and/or negligent misrepresentation; and (4) wrongful death which is based on the above counts. The defendants have moved for a directed verdict against the plaintiffs on all their counts.

a. **Breach of Contract Counts.**

As noted above, the first two counts of the Hasenfus' complaint seek relief based on breach of written contract and breach of oral contract, respectively. Sawyer also asserts a claim for breach of contract on behalf of the deceased, Wallace B. Sawyer.

Eugene Hasenfus' claim for breach of written contract withstands the motion for directed verdict because there exists sufficient evidence from which a jury could infer the existence of a contract and a breach thereof in the form of money due and owing under the contract. Admitted into evidence was a document entitled "Independent Contractor Agreement" which was signed by Eugene Hasenfus and William Cooper for CAS, Ltd. Plaintiffs do not dispute the existence or authenticity of this document. At trial, Eugene Hasenfus testified he considered himself employed by SAT and was paid money for his services and that said funds were wired on a regular basis, until the crash, into his bank account. The motion for directed verdict is denied as to this count.

Sally Hasenfus' claim for breach of oral contract stems from her allegations that the defendants through their agents made representations to her concerning the payment of her expenses, including legal costs to obtain her husband's release. In support of her allegations, she

testified at trial that she was paid $6,000.00 in cash in a brown paper bag which was to defray her expenses. She testified that no such legal defense fund to help pay the expenses was provided which caused the Hasenfus family to spend their own money and savings in an attempt to free Eugene Hasenfus. This claim also withstands the motion for directed verdict since the jury could infer through various events at the time that Sally Hasenfus had such a contract with the defendants, through their agents or joint venturers.[4]

The Sawyers' complaint also includes a breach of contract count alleging that defendants breached the contract by failing to pay Sawyer his full salary or to reimburse Kasanee Sawyer for expenses arising from Sawyer's death and for death benefits. In evidence was a document signed only by Sawyer entitled "Independent Contractor Agreement" which closely matched the Hasenfus Independent Contractor Agreement also in evidence. The document with Sawyer's signature included the amount per month which was to be received. Kasanee Sawyer testified that her husband took care of most of the finances, and that money was transferred to the account she was authorized to use. She did not, however, have any knowledge of where the money came from.

Although there was no direct evidence in support of death benefits as part of the contract, the jury could have inferred such benefits from the evidence presented at trial. For example, Richard Secord's testimony at trial concerning

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[4] Admittedly, the evidence tending to prove the existence of an oral contract is very weak; however, considering the circumstances and events occurring in this case, this claim must go forward.

the fact that he tried to get money to the families could be inferred by the jury to imply that certain death benefits were to be paid.[5] The Court agrees that the plaintiffs have marshalled very meager evidence tending to prove that death benefits were part of the contract; however, the Court will not engage in making a credibility determination. This is a jury issue, and the motion for directed verdict is denied as to the breach of contract count in the Sawyer complaint.

b. Sally Hasenfus' Claims for Misrepresentation.

To prevail on the intentional misrepresentation claim, a plaintiff must establish the following elements:

> (1) a false statement of fact, (2) known by the defendant to be false at the time it was made, (3) made for the purpose of inducing the plaintiff to act in reliance thereon, (4) action by the plaintiff in reliance on the correctness of the representations, and (5) resulting damage to the plaintiff.

Stowell v. Ted S. Finkel Inv. Services, Inc., 641 F.2d 323, 325 (5th Cir. 1981). To prevail on a claim for negligent misrepresentation, a plaintiff must establish the same elements above with one slight modification. With respect to the second element, the plaintiff need only show that the defendant negligently failed to ascertain the truth or falsity of the representation. See Emerson Electric Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970).

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[5] The jury could likewise consider Richard Secord's statements as gratuitous comments only. The jury is to determine the meaning of these comments in light of the circumstances and events occurring at the time.

Sally Hasenfus alleges that the defendants, through their agents or joint venturers, made representations to her that they would provide a legal defense fund, and would compensate the Hasenfuses for expenses and damages incurred in connection with Eugene Hasenfus' capture, detention and trial in Nicaragua. She further alleges that representations were made that she should stop efforts to raise a legal defense fund. All the representations are alleged to be false and misleading at the time they were made[6] or made without knowledge of the truth or falsity of the representations.[7]

The same evidence that tends to prove the existence of Sally Hasenfus' oral contract claim, likewise, is supportive of her misrepresentation claim. The jury could infer that the $6,000.00 paid in a brown paper bag to Sally Hasenfus was to go towards the formation of a legal defense fund that was to compensate the Hasenfuses for expenses incurred to obtain the release of Eugene Hasenfus. She also testified that various representations were made to her that she understood to mean that a defense fund would be provided. Although the evidence is weak on this claim, the inferences are enough to create an issue of fact that the jury should determine. Thus, the directed verdict motion is denied as to Sally Hasenfus' misrepresentation claims.

c. The Sawyers' Negligence Claim.

Plaintiffs in count II of the Sawyer complain seek recovery based on negligence. Florida, adhering to the

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[6] This is the third cause of action for Intentional Misrepresentation.

[7] This is the fourth cause of action for Negligent Misrepresentation.

universal formulation, permits recovery if the plaintiff demonstrates (1) that he or she was owed a duty of reasonable care from the defendant, (2) that the duty was breached, (3) that the breach was the actual and proximate cause of the plaintiff's injury, and (4) that the plaintiff sustained damages. E.g., Reinhart v. Seaboard Coast Line R. Co., 422 So. 2d 41 (Fla. Dist. Ct. App. 1982).

The Sawyers' Third Amended Complaint alleges that the defendants owed Wallace B. Sawyer the duty of reasonable care to provide a reasonably safe aircraft with adequate safety equipment; that this breach was the direct and proximate result of plaintiff's injury; and that plaintiffs sustained damages.

After reviewing all the testimony presented in the case in the light most favorable to plaintiffs, the parties opposing the directed verdict motion, the court concludes no reasonable juror could conclude that the alleged failure to provide safe equipment constituted a contributing cause to the crash. There is no evidence that but for the defendants' alleged negligence, the aircraft would not have been shot down. The aircraft in which Wallace B. Sawyer and Eugene Hasenfus were flying on October 5, 1986 was directly hit by an unseen heat-seeking missile. It is undisputed that the missile was the direct and proximate cause of the crash. No evidence whatsoever disputed the testimony of Eugene Hasenfus, the sole survivor of the crash, that the aircraft was fully functional nd operating normally on that very day. Nor is there any evidence that the alleged failure to provide an unspecified defense system or different navigational system was a material and substantial factor in causing Sawyer's death.

By beginning with the analysis of the causation element, the Court assumed for the sake of discussion that plaintiff had been able to prove that the equipment provided to them during the final stages of the resupply operation was deficient in some manner. The evidence was also completely lacking as to any breach which could involve deficiencies or malfunctions in the equipment during the final stages of the operation. In fact, the only evidence relevant as to this point was form Eugene Hasenfus, who testified that the equipment was fully functional and operating normally that day. No evidence of any malfunctions that day or anytime during the final stages of the mission was offered.

Plaintiffs attempted to get around this problem by creating the illusion of malfunctions in the equipment through testimony of the operation and accuracy of the equipment in the earlier stages of the operation. The Court found that the operation of the equipment in the earlier stages of the mission was too remote in time and not relevant to the operation of the equipment in the final stages of the mission. The testimony in this area was limited to the six to eight weeks prior to October 5, 1986, when the crash occurred.

During the trial, plaintiffs presented a variation of their original theory of liability which they allege constitutes culpable conduct on the part of the defendants.[8] The "day versus night" theory as alleged creates liability due to the fact that the aircraft was flying in the day, instead of the

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[8] This "day versus night" theory was advanced for the first time at trial. Through a liberal reading of the Third Amended Complaint, the Court allowed plaintiffs to go forward with this theory at trial.

night. The duty to take special precautions and minimize the risk of harm to Sawyer is alleged to have been breached by forcing Sawyer to make day-time drops, as opposed to the night-time drops. Plaintiffs contend that the poor condition and technologically inferior navigational systems in the aircraft, forced the crew to fly the resupply runs in southern Nicaragua during the daylight hours; they allege that this forced day-time flying caused an increased risk of danger which somehow contributed to the crash on October 5, 1986.

This negligence theory is rejected without much difficulty. Plaintiffs insist that the Court should concentrate only on the safety factor and not take into consideration any other circumstances, such as the efficiency factor. The testimony of John Piowaty[9] was that the day drops in the south were more efficient since it was more difficult in the south to see the drop zones. While the safety of the entire operation is a highly relevant factor in determining whether there is any negligence on the part of the defendants, the key is what is reasonable under the circumstances.

The best determination of what is reasonable under the circumstances of whether the flights in the south should be made in the day or night was undisputedly left up to the crew. The people recruited to participate in this mission

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[9] John Piowaty was a crew member participating in the covert operation during the relevant time period. He was a seasoned pilot in this type of mission and had first hand knowledge of the problems associated with the drops that were being made in the south of Nicaragua. Mr. Piowaty, an expert in the various navigational systems discussed during the trial, described the basic operation of each system including the pros and cons associated with the use of each type of navigational system.

were not commercial pilots; they were pilots with experience in combat type missions. For this "day versus night" theory to hold, plaintiffs would have to establish that Sawyer somehow was forced to make the day flights, and that Sawyer and the other crew members preferred the night flights since they were more safe. The undisputed testimony by John Piowaty at trial was that the crew made the decision as to when to fly on the resupply missions. Mr. John Piowaty also testified there were dense jungles and rivers in southern Nicaragua, making dead reckoning[10] necessary to reach the drop zones, and that the decision to fly during the day was made only by the crew members.

Without any supportive evidence, plaintiffs claim that if the plane had been equipped with an Inertial Navigational System[11] ("INS"), the crew would have opted to fly at night, creating less likelihood of being shot down by a heat-seeking missile. In fact, the evidence in this case has been that even with an INS the plane could still have the same chance of being shot down by the heat-seeking missile. The "flame signature" from the plane's engine could be more readily seen at night; a ground missile operator could lock on this "flame signature" hitting the plane with 95% or greater rate of accuracy. The evidence is undisputed that the decision to make the drops during the

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[10] Dead reckoning is a technique by which the crew could calculate their course and find the drop zones to get the supplies to the Contra forces.

[11] This type of system relies solely on an internal navigational tracking system. In the simplest terms, the system is set at the beginning of the flight with the correct location coordinates of where the aircraft is positioned and continues to calculate an approximate location depending on the direction, seed and distance traveled.

day were made by the crew only. Moreover, absent in the record is any evidence that had the aircraft been equipped with an INS the drops in southern Nicaragua would have been made in the night or even that flying in the night would have been safer.

Finally, even giving plaintiffs the presumption that some type of breach of duty occurred, the causation element cannot be proved. Taking the evidence in the light most favorable to the plaintiffs, allowing every reasonable inference possible, no reasonable jury could find that any alleged breach on the part of the defendants was causally related to the crash which occurred when the aircraft was hit by an unseen heat-seeking missile on October 5, 1986.

d. The Sawyers' Misrepresentation Claims

The Sawyers' misrepresentation claims ar count III and IV of their Third Amended Complaint. To prevail on these claims plaintiff must prove the elements as set forth in section b. above. These claims do not withstand the directed verdict motions because there was no evidence of any knowingly or negligently false statements of material facts upon which Wallace B. Sawyer justifiably relied and which caused his death or other damages. Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1103 (11th Cir. 1983) (applying Florida law on misrepresentation). Plaintiffs allege that representations were made that safety equipment or repair of the planes could not be provided due to the lack of money provided to run the operation.

No evidence supported the claim that any of the above statements were made to Sawyer or that Sawyer relied on the statements resulting in damage to Sawyer.

Clearly, plaintiffs have not adduced sufficient evidence to show that the alleged misrepresentations were actionable. The motion for directed verdict must be granted as to Sawyers' misrepresentation claims.

e. Eugene Hasenfus' Conversion Claim

To establish a tort of conversion, the evidence must reveal that the jury will be able to conclude reasonably that the defendants, through their agents or joint venturers, committed a "wrongful exercise or assumption of authority" over Eugene Hasenfus' personal papers. See Star Fruit Co. v. Eagle Lake Growers, 33 So. 2d 858, 860 (Fla. 1948). In other words, to find liability on the conversion theory there must be evidence of wrongful deprivation of identifiable property for an indefinite period of time. 12 Fla.Jur.2d, Conversion and Replevin section 6 (1979).

Applying these principles to the facts presented in this case, it is clear that no reasonable jury could find for plaintiffs on the conversion count. Paragraph 55 of the Hasenfus' Third Amended Complaint states that:

> 55. Plaintiffs are informed and believe and based thereon allege that following Hasenfus' capture in Nicaragua, defendants took possession of the personal papers and effects of Hasenfus and destroyed some of them in order to cover up various aspects of the Contra re-supply operation and defendants' participation therein. Defendant Southern Air then sent the remaining "sanitized" papers and effects of Hasenfus to his home in Wisconsin.

The property allegedly destroyed or withheld from plaintiffs was not specifically identified in the complaint. In any event, there was no evidence of any wrongful deprivation of property or wrongful assumption of authority. The testimony was that Eugene Hasenfus' camera, personal papers[12] and an unspecified amount of cash was somehow taken and never returned to plaintiffs. The plaintiffs' allegations are unsupported and purely conclusory. The Court is not challenging the credibility of Eugene Hasenfus' testimony that these items are missing; however, the door is not wide open for plaintiffs to impose liability on these defendants absent sufficient evidence to create a jury issue on the conversion count.

III.

CONCLUSION

For the foregoing reasons, the defendants' motion for directed verdict is GRANTED IN PART and DENIED IN PART. The plaintiffs will be permitted to seek to impose vicarious liability on the joint venture theory and agency theory. The Hasenfuses will be permitted to go forward with Count I, II, III and IV of their Third Amended Complaint. Kasanee Sawyer's will be permitted to go forward only with Count I, the breach of contract claim, set forth in her Third Amended Complaint.

DONE AND ORDERED at Miami, Florida, this 10th day of September, 1990.

[Signed by Clyde Atkins]
SENIOR UNITED STATES DISTRICT JUDGE

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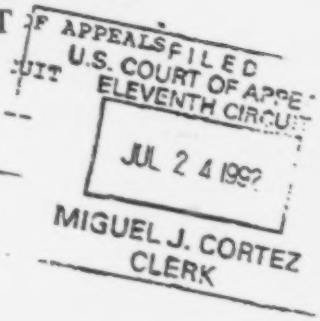
[12] The personal papers include ticket stubs and other bits of paper that belonged to plaintiff Eugene Hasenfus.

O-3-1

OPINION 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



RE: 91-5106

EUGENE HASENFUS and
SALLY HASENFUS,

Plaintiffs-Appellants,

versus

RICHARD SECORD, an individual,
CORPORATE AIR SERVICES, a
Pennsylvania corporation;
SOUTHERN AIR TRANSPORT, a
Florida corporation;
ALBERT HAKIM, an individual,

Defendants-Appellees.

RE: 91-5107

KASANEE SAWYER, an individual,
KASANEE SAWYER, Administrix
of SAWYER, WALLACE B., Deceased,

Plaintiffs-Appellants,

versus

O-3-2

RICHARD SECORD, an individual,
CORPORATE AIR SERVICES, SOUTHERN
AIR TRANSPORT, a Florida corporation,
ALBERT HAKIM, an individual, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: HATCHETT, Circuit Judge, JOHNSON and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The petition for rehearing filed by appellants, Eugene Hasenfus, Sally Hasenfus and Kasanee Sawyer is denied.

Denied.

ENTERED FOR THE COURT:

...E COURT:

UNITED STATES CIRCUIT JUDGE

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on October 22, 1992, I served the within *Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: Original and Forty Copies)

Robert M. Beckman, Esquire
Beckman & Kirstein
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201 South Biscayne Boulevard
Suite 900
Miami, Florida 33131

Clerk, U.S. Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 22, 1992, at Los Angeles, California.

Betty J. Malloy
(*Original Signed*)